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Nos. 80-1190, 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated, UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioners,*

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONER, PULLMAN-STANDARD

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below applied wrong legal criteria in determining the bona fides of the seniority system.

2. Whether a federal court of appeals is bound by the "clearly erroneous" rule of F.R.Civ.P. 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of the consolidated cases in this Court contains the names of all such parties except for International Association of Machinists and Aerospace Workers, AFL-CIO and its Local 372 which were also parties for limited purposes in the court below.[1]

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[1] References to the Joint Appendix will be made by the use of the letter "JA" followed by page number. To conform page references herein to those in the USW brief on the merits, we will make references to the Appendix to Petition for Writ of Certiorari in No. 80-*1193* by abbreviation "Pet.App." followed by page number. The employer will frequently be referred to simply as "Pullman". The United Steelworkers of America will be referred to by the initials "USW". For simplicity, the abbreviation "USW" may also refer to the predecessor of the United Steelworkers which was known as Steel Workers Organizing Committee. Where reference is desired specifically to the Steelworkers Local Union, it will be designated "USW Local 1466". In similar fashion Association of Machinists and Aerospace Workers will be referred to as "IAM" and its Pullman Local as "IAM Local 372".

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BRIEF OF PETITIONER, PULLMAN-STANDARD

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinions and judgments of the courts below are reported as follows: (1) Opinion of the United States District Court for the Northern District of Alabama on September 13, 1974, reported at 11 FEP Cases 943 and 8 EPD ¶ 9720 (Pet.App.117a); (2) Opinion of the United States Court of Appeals for the Fifth Circuit on August 30, 1976, reported at 539 F.2d 77, 13 FEP Cases 604, and 12 EPD ¶ 11,177 (Pet. App.67a); (3) Opinion of said District Court on July 5, 1977, reported at 15 FEP Cases 144 and 14 EPD ¶ 7815 (Pet.App. 45a); (4) Opinion of said District Court on October 11, 1977, reported at 15 FEP Cases 1638 and 15 EPD ¶ 7995 (Pet.App.48a); (5) Opinion of said District Court on May 5, 1978, reported at 17 FEP Cases 830 and 17 EPD ¶ 8604 (Pet.App.23a); (6) Opinion of said Court of Appeals on August 18, 1980, reported at 624 F.2d 525 and 23 FEP Cases 748 (Pet.App.1a).

JURISDICTION

The judgment sought to be reviewed was dated and entered on August 18, 1980. Pursuant to timely filed Petitions for Certiorari by Pullman-Standard, a Division of Pullman, Incorporated in No. 80-1190, and by United Steelworkers of America, AFL-CIO and Local 1466, United Steelworkers of America, AFL-CIO in No. 80-1193, the Court on April 20, 1981 granted both petitions for writs of certiorari limited to Question One presented by each petition. The order granting the writs of certiorari consolidated the two cases (49 L.W. 3788). Jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. §§2000e et seq., specifically Section 703 thereof (42 U.S.C. §2000e-2) and Section 706 thereof (42 U.S.C. §2000e-5). Additionally the Civil Rights Act of 1866, 42 U.S.C. §1981. Sections 703, 706 of Title VII and §1981 have been already set forth in the Appendix to the Petition for Certiorari in No. 80-1190 at pages A-180-191 and are therefore not reproduced herein.

STATEMENT OF THE CASE

The portions of the record which are material to the consideration of the questions presented may be summarized as follows: Jurisdiction in the district court was based on §706(f)(1) of Title VII and 42 U.S.C. §1981. The complaint, which was twice amended, at all times alleged with respect to the seniority system whose legality was challenged that all conditions of employment of the plaintiffs were governed and controlled by the collective bargaining agreements between USW and Pullman and that under and pursuant to such agreements a seniority system was established which was alleged to discriminate against black employees (JA 15-16, 20-21). The IAM was joined as a party defendant in the

amended and second amended complaints simply as a Rule 19(a) defendant F.R.Civ.P. Rule 19(a). The pleadings did not allege anything about a seniority system to which the IAM was a party. No damages were sought against the IAM. The IAM was not joined as a party until the commencement of the first trial (JA 31-32) and then only "for the limited purpose that a part of the relief sought by the plaintiffs may involve some modification to the collective bargaining agreement" with Pullman. IAM Local 372 was joined eight days after the first trial began, likewise, for the limited purpose of enabling the Court to modify its collective bargaining agreement if necessary (JA 32-41). The district court entered a pretrial order dated June 4, 1974 limiting the seniority issue to the system of departmental seniority established in the Pullman-USW contract. At all times since 1944 the seniority provisions in the Pullman-IAM Local 372 contracts have provided for seniroity based on length of service in job classifications (JA 177). Nothing in any pleading or pretrial order was ever addressed to that job classification or occupational seniority provision.

The Pullman plant at Bessemer, Alabama was built in 1929 and is engaged in manufacturing many types of railroad cars. Not only are there frequent and large fluctuations in the size of the work force at Bessemer (JA 37, 90), but also as each new car order goes into production there are large manpower fluctuations in the 27 departments which peak at quite different times (JA 37). The skills in the various USW departments, such as painting, welding, and assembling, are not readily interchanged. The historical facts underlying the Pullman-USW seniority system are as follows: On August 1, 1941, the USW filed a petition with the National Labor Relations Board seeking to represent a unit of all Pullman's production and maintenance employees. Thereafter, three unions intervened in this representation proceeding; IAM Local 359, IBEW Local B 287, and Federal Labor Union, AFL (JA 105, 106, 152, 158, 165). The IAM and IBEW sought craft units of skilled workers and apprentices and helpers coming within

their traditional craft jurisdictions. The Federal Labor Union sought a residual unit of all production and maintenance employees except those being sought by the IAM and IBEW.

On August 28, 1941 the NLRB conducted an extensive hearing to determine the appropriate unit or units for the purpose of collective bargaining at the Pullman plant. Throughout much of this hearing evidence was introduced concerning the skills of the employees sought to be represented by the two craft unions. Following the hearing the NLRB entered a decision and direction of elections (JA 150-60) in which it determined that the units sought by the craft unions were true craft units comprised of skilled workers, helpers and apprentices, with a community of interest as such craft workers. The Board also found that an overall production and maintenance unit would be appropriate as would also the residual type unit being sought by the Federal Labor Union. It ordered an election to be held among three voting groups such that if the USW won all the elections it would be certified for an overall unit but if the craft units won in their respective voting groups they would be certified for the respective craft units. The employees sought to be represented by the IBEW were the electricians and powerhouse workers, both of which in 1941 were for administrative and payroll purposes part of the maintenance department. The craft unit sought by the IAM also cut across existing departmental lines and included some employees in the existing maintenance department, namely the millwrights, some in the die and tool department, all in the welding department, all in the wheel and axle department except crane hookers, and some in the existing steel erection department, namely the air brake pipe men, and tool room employees. As a result of the election, the Board certified the IBEW for the electricians and powerhouse employees; the IAM for the employees sought by it, inadvertently including, however, the employees of the truck department (JA 120, 136, 137, 149, 170, 171); and the USW for all the remaining production and maintenance employees plus the guards.

The source of the inadvertent inclusion in the IAM unit of the non-craft truck department was testimony at the Board hearing that the wheel and axle and truck departments were treated as one on the payroll (JA 131), and used a common crane (JA 138), and their work was in the same area and closely coordinated (JA 130). Some question was raised at the hearing by the USW as to whether the IAM sought to represent black employees. The evidence was uncontradicted that the IAM was willing and able to represent black employees falling within its craft jurisdiction (JA 145, 149). Following the certification, the IAM became aware that its certification covered unskilled truck department employees who were black. The IAM took the bargaining position that it would accept representation of the truck shop employees according to the certification but that it did not want to do this (JA 207). Pullman took no position as to the appropriateness as to any of the units sought in the NLRB proceeding (JA 110, 155). Following the decision and direction of election but before the election, the USW moved the Board to reconsider its unit determinations and alleged that the unit sought by the IAM covered diversified and unrelated employees scattered in small groups around the plant, with little common degree of skill. The Board denied this motion and certified the units as set out in the decision and direction of election, although the record shows the IAM never sought the truck employees (JA 137, 148). The IAM and USW took the inadvertent inclusion of the truck department employees to the Board which requested the unions to settle the matter by agreeing upon a correction of the inadvertent error. Thereupon the unions agreed upon a correction, the substance of which was to move the truck employees from the IAM unit to the USW bargaining unit. Pullman, after being repeatedly urged to do so by the Board (JA 293), accepted this arrangement, adding a notation "assuming that the foregoing is satisfactory to the Board, and subject to Board orders" (JA 170-71).

Thereafter bargaining commenced in December, 1941. At all times bargaining was separate with the IAM and the USW

and although Pullman sought a degree of flexibility in switching employees from one department to another, irrespective of seniority, the USW held out for straight departmental seniority. Eventually agreement was reached on a departmental seniority clause in the first USW contract dated April 7, 1942 (JA 180-82).

In 1944 there were a number of strikes in the plant. One of these strikes was by the IBEW. Pullman managed to replace all strikers, following which the USW petitioned to represent the electricians and powerhouse workers; the strike replacements voted for the USW and the IBEW was decertified by order of the Board, thereby merging its unit back into the USW unit. The electricians were immediately placed back into the maintenance department on the USW seniority list; however, the powerhouse employees were kept separate on the seniority list from 1944 to 1947, evidently because of the desire of employees once seniority groupings had been established to continue in the same status (JA 323).

The other strikes in 1944 were numerous and reflected dissatisfaction by the members of the IAM unit who were scattered among the production departments, namely the welders, air brake, tool room, and wheel and axle men, whereas the craft nucleus of machinists and other die and tool employees as well as the millwrights, remained loyal to the IAM. The strikes were in support of organizational efforts by the USW to represent some of the employees then represented by the IAM (JA 337). The record of one of these strikes in January, 1944 (JA 255), indicates that most of the strikers were USW unit employees. This record also shows that at that time there were four black employees in the IAM unit, two of whom struck and two of whom did not strike in the January, 1944 organizational strike. Later in 1944 the organizational efforts of the USW were more successful and it petitioned on May 25, 1944 for an election to take over the entire IAM bargaining unit (JA 294-297). The USW had evidently attained its majority by May, 1944 when it filed its petition and matters had progressed to the point that only the

millwrights and tool and die employees had crossed the latest organizational picket lines. The NLRB then ordered a hearing on the USW petition. At this meeting on June 14, 1944, the NLRB sought an amicable settlement of the matter. The USW spokesman Herring stated that the USW would agree to annex all of the IAM unit except for the die and tool employees and millwrights who had crossed their picket line as "they didn't want them scabbing son-o-bitches, they came across our picket line" (JA 338). The IAM, rather than submit the question to an election which might result in their losing the entire unit, agreed to this proposal which was then reduced to writing (JA 174-175). To this agreement of the union there was appended a paragraph over the signature of Pullman to the effect that it had taken no position in the selection of bargaining representatives by its employees, took no responsibility for this agreement but acquiesced in it in the interest of industrial peace, and would recognize the unions for their respective agreed on units, subject to any valid order or legal requirement to the contrary (JA 176).

It is clear from the record that there were at least four blacks in the IAM unit, two of whom at least were welder helpers, who were by virtue of this agreement moved out of the IAM bargaining unit and into the USW bargaining unit (JA 255). There was a total of approximately 100 employees moved out of the IAM unit and only some 50 who remained. (Co.Ex. 62, 63, 1978 trial).

In its 1942 and 1944 contracts, the IAM had agreed to departmental seniority. However, following the loss of two thirds of its bargaining unit, it amended its June 13, 1944 contract (JA 172) on October 6, 1944 (JA 177) so as to eliminate the three departments where it had no further representation rights and to change its system of seniority to length of service in each respective classification. From October 1944 on, the regime of occupational or job classification seniority has prevailed in the IAM bargaining unit.

In 1947 negotiations between USW and Pullman it was proposed by black union committeeman Gus Dickerson that the seniority system in the USW contract also be changed to occupational seniority (17 FEP Cases at 738, Pet.App.40a; JA 256, 274). This was agreed to and occupational seniority continued to be the rule until 1954.

When the IAM lost its employees in three departments in June, 1944, two of the departments, welding and wheel and axle, which had been separate departments at all times, remained intact as seniority units in the USW. The air brake pipe shop department, which was split off from steel erection in 1941 when the IAM was certified, was retained in June, 1944 as a separate seniority department and was not merged back into steel erection at that time. This may well have reflected the usual desire of employees not to alter seniority status once established (JA 323).

When the seniority regime was changed from departmental to occupational on the June 1, 1947 seniority list, many nominal departments were merged on the USW seniority list. However, since seniority now applied by occupation, in no case was there any merger of seniority units. Thus, in June, 1947, the powerhouse, formerly an IBEW department, was placed back under the heading of maintenance department, as was the railroad department. Air brake pipe shop was put back on the steel erection seniority list, along with the tool room. At the same time, the truck/tractor department was merged on the list into miscellaneous stores and crane service into steel stores. It is apparent that none of these paper changes merged any seniority groups which were now fragmented or divided down to the occupational level. Between 1947 and 1954 there were several other mergers of departments on the seniority list which likewise did not affect anybody's seniority. Thus, in 1951 the janitors and plant guards were placed in a single safety department, but they remained in separate seniority groups. The only significantly new department formed after 1942 was the inspection department. This was a small group of employees originally taken

from welding, steel erection, template and wood erection. They were tried out as a separate department for a year, then moved back on the seniority list into slightly different departments from whence they came. After a year of this they were again placed back into a separate department on the seniority list in 1950. Since then they have remained a separate department. In 1954 the USW successfully demanded that Pullman bargain in Chicago jointly for the Bessemer, Hammond, Indiana and Butler, Pennsylvania plants. In these negotiations the USW demanded that Bessemer be returned to departmental seniority which was already the arrangement at Butler and Hammond. Pullman agreed to do this in the 1954 contract but in preparing new seniority lists certain of the historical seniority groupings were kept intact by dividing certain departments manned by employees with different seniority standings and skills. The most important one of these according to the courts below was the separation of plant protection and janitors into separate departments, which did nothing to affect existing seniority rights but preserved them. In the same manner, the powerhouse department was reestablished out of the maintenance department, as was the historically separate railroad department. The boiler house was created then as a new department with about two or three employees, but this department had been entirely vacant since May, 1965 so that any practical significance it may have had was extinguished prior to the effective date of Title VII. The only other significant departmental change was the merger of two fairly large, both well integrated, departments into the paint and shipping track department. Since 1954 there were no changes in the seniority system except that in 1969 and 1972 Pullman entered into bilateral agreements, that is ones not entered into by either union, with the Department of Labor OFCC to confer certain preferential treatment on black employees. These preferences included transfer rights with full seniority out of four all black or substantially black departments into any other department in either bargining unit. In addition, all black employees hired before April, 1965 had transfer rights with full seniority into formerly all-white

departments in which they had the qualifications to work. The evidence showed without dispute that at all material times well over 90% of the black employees were in racially mixed departments and that the contractual departmental seniority rights have resulted in blacks having advanced rapidly to higher job classifications in each department, displacing white former incumbents of those jobs as layoffs and recalls occurred after 1965. It is apparent that if discrimination existed at the Bessemer plant it was in spite of and not because of the departmental seniority system which was a vehicle of upward mobility after 1964. After 1966 Pullman was clearly engaged in efforts to move whites into formerly predominately black departments and blacks into formerly predominately white departments (15 FEP Cases at 148; Pet.App. 53a).

The history and changes in departmental organization, union representation, and system of seniority are graphically summarized in the chart at JA 336.

Pullman presented a variety of statistical studies which indicate, along with other proof, that its seniority system and the OFCC Agreement have in fact not perpetuated any wrongs or retarded black progress but that blacks have rapidly advanced. The actual percentage of black employees at Bessemer is significantly higher than in the relevant labor market; random distribution therefrom would result in a work force about one-third black, while the observed frequency is around 50%. In the last year before the first trial for which such data was available, 1973, the mean annual earnings of black employees, including Unemployment and Supplemental Unemployment Benefits was 98.5% the average for all employees. Calculation of mean annual earnings for 1970 through 1973 showed the black percent of the mean was 94, 96, 96.1 and 98.1% respectively. It is clear that there has been a gradual and consistent improvement in the prosperity of black employees.[1] The District Judge's independent analysis

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[1] The Fifth Circuit in the 1976 appeal held (539 F.2d at 97; Pet.App.99a-100a) that these statistics were *irrelevant* and that it was improper to consider them, because they did not reflect differences in seniority and time worked.

of the data showed that 40% of the blacks and only 36% of the whites were in the upper half of departments ranked according to departmental desirability.[3]

In analyzing the record evidence of industry practices, a distinction must be drawn between (1) departmental seniority accrual and administration; (2) the delineation of departments; and (3) the existence of separate bargaining units, actually not a part of the seniority system in question here at all. As for (1), the evidence was quite substantial and uncontradicted that departmental seniority was the model or generally prevailing practice in large industrial plants as well as in the transportation equipment industry in particular; that a majority of such plants had departmental or smaller seniority units (JA 325-27, 331; Co. Ex. 20, 1978 trial, USDL Bulletin on Major Collective Bargaining Agreements 1425-11, "Seniority in Promotion and Transfer Provisions" (1970)). It was also shown that the larger the plant and the more varied the requisite skills, the more prevalent it was for departmental or narrower (e.g., occupational) seniority units to be agreed to; that —

> "For purposes of efficiency and to minimize disruptions, most employers prefer to confine promotions . . . within smaller units and jobs calling for identical or closely related skills. . . ." Co. Ex. 20, *supra.*

It was shown that the seniority clause of a collective bargaining agreement is the "Union's clause"; that it confers no advantage on management, which can make decisions based on

[3] The Fifth Circuit's 1976 opinion held that "departmental desirability" was not relevant to whether there had been a racially discriminatory departmental seniority system (539 F.2d at 89, 93; Pet. App. 83a-84a, 89a-90a) except that it would be relevant to prove, but not to disprove discrimination. The opinion further said evidence of economic harm was irrelevant to the question of discrimination unless it favored plaintiffs' case, and also irrelevant to an award of back pay unless defendants first carried a burden of "convincingly [bringing] into question the class' entitlement to it." The Fifth Circuit's 1980 opinion again said (624 F.2d at 531; Pet.App. 10a) that although evidence of economic desirability cannot help the defendant, it may be considered to the extent it favors the plaintiffs.

pure self-interest within limitations of law, without any seniority clause; that a seniority clause is a union demand, not management's, and limitations on application of seniority, either by adoption of seniority units narrower than plant-wide, or by conditioning seniority application on relatively equal ability, are commonly regarded by management as necessary to efficiency. The balance usually struck, particularly where the plant is large and the skills are varied and not interchangeable, is to adopt seniority units less than plant-wide composed of employees having related skills (JA 321-24). Thus the evidence amply supported the District Court's finding of conformity to industrial practice (17 FEP Cases at 735, 737; Pet.App. 33a, 37a-38a) so far as the basic principle of departmental seniority is concerned. (2) As for the delineation or scope of the departments in the USW bargaining unit is concerned, the evidence showed they generally conformed to the practice in similar plants, with no more variation than those varied from each other (Butler, JA 206, 317-19; Hammond, JA 242; ACF, JA 329-30; Evans Products, JA 332-33; Greenville Steel Car, JA 334-35; Eastern Car, JA 305-12). The difference that Bessemer's IAM bargaining unit cuts across departmental lines falls in the third, not the second category of industrial practice, and actually is not part of the Pullman-USW seniority system at all. (3) As for the division into two separate bargaining units, the District Court found this conformed to industry and NLRB practice for the elementary reason that this was ordered by the NLRB, which had discretionary authority to make determinations of appropriateness of craft units, and power to make conclusive fact findings if supported by evidence (17 FEP Cases at 736; Pet.App.36a). The Fifth Circuit declared the existence of the IAM unit had no conceivable purpose but racial discrimination (624 F.2d at 531, 533, Pet.App.11a, 16a) and found the entire seniority system (erroneously conceived of as the sum of all seniority rules at the Bessemer plant) did not conform to industry or NLRB practice, because there was no craft unit at Butler or Hammond (624 F.2d at 531, 533; Pet.App. 11a, 16a). The

simplest answer to this is that the separate IAM unit was not even part of the USW seniority system, therefore could not make it fail to conform to industry practice; a second answer is that craft units exist in hundreds of industrial plants, as specifically contemplated by Congress, wherever the NLRB has done what happened here (found craft unit appropriate, majority voted for separate representation, NLRB certified union) but not in otherwise similar plants whose bargaining history differed in those respects, and simply for those historical reasons.[4] The Fifth Circuit closed its eyes to the fact

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[4] The Bessemer USW unit excluded machinists and millwrights, but included plant guards. The inclusion of plant guards would be illegal in units certified after 1947. 29 USC §159(b). The Butler and Hammond USW units included machinists and millwrights but *excluded* guards (JA 199). The exclusion of machinists at Bessemer has no more significance to conformity to industry practice than the inclusion of guards at Bessemer and their exclusion at Butler. The reasons were historical (cf.footnote 23, *infra*). Furthermore, the Fifth Circuit erred in concluding Bessemer was unique in the "Pullman Family" (624 F.2d at 532, 533, JA 12a, 16a) in having a bargaining unit of fewer than all production and maintenance employees. The record shows (JA 200) the Pullman Car Works Passenger Car Plant at Chicago had a USW bargaining unit bargained for jointly with Butler, Bessemer, Worcester and Hammond in 1956. This bargaining unit included most production and maintenance employees but excluded the following craft categories: stationary engineers, production and maintenance electricians, metal polishers and buffers, and platers and helpers. It also excluded guards. The excluded craftsmen were in IBEW and Metal Polishers Union bargaining units. *Pullman-Standard Car Mfg. Co., Pullman Car Works Plant,* NLRB Case No. 13-RC-2639 (August 13, 1952). Also Pullman-Standard operated a shipyard in Chicago in 1943 where the NLRB certified the USW for a unit of production and maintenance employees, excluding tugboat crews among others. *Pullman-Standard Car Mfg. Co.*, 49 NLRB 542 (1943). Both Butler and Hammond have separate guard bargaining units. *Pullman-Standard Car Mfg. Co.*, 61 NLRB 1398 (1945). These examples expose the Fifth Circuit's basis for finding the USW bargaining unit at Bessemer not in conformity with industry practice, as totally false.

that bargaining units, like seniority systems (they are often coterminous) come in many sizes and shapes; and that this is a necessary consequence of the discretion and flexibility given the NLRB by 29 USC §159(b), and of the concern accorded to employee choice or preference in such matters by federal labor policy. Existence of separate units could in no meaningful sense make a seniority system fail to conform to industry practice where they were prescribed by the NLRB; industry must in general be presumed to be law-abiding. As pointed out by the District Court, the petitioners herein had no real choice but to contract for seniority rules to apply to employees within the unit certified by the NLRB (17 FEP Cases at 736; Pet.App. 36a). It is the *Gestalt* of the system (17 FEP Cases at 737; Pet.App. 37a) which must be looked to for judging conformity to industry practice rather than to its minutiae. The fact that over 90% of the employees were always in racially mixed departments must be considered in that process. The District Court was surely not clearly erroneous in finding that the Pullman-USW seniority system conformed to industry practice and applicable NLRB decisions.

SUMMARY OF THE ARGUMENT

The Court of Appeals applied incorrect legal criteria in determining the bona fides of the seniority system in question. The ultimate test of bona fides is whether racial discrimination motivated the negotiation or maintenance of the seniority system; but the Court of Appeals distorted the term "genesis" as used in *Teamsters* v. *United States*, 431 U.S. 324 (1977) to mean, not motive or purpose, but simply discrimination "in the air" or something akin to original sin. It thereby resurrected the pre-*Teamsters* test of bona fides as one of perpetuation of past discrimination, and held, contrary to *Teamsters*, the seniority system was not bona fide.

Purpose and motive are mental states of the decision-makers who negotiated the seniority system. At the plant in question there were two unions bargaining independently of

each other; their contracts had separate sets of seniority rules. A seniority system being a complex unity subject to a common plan or serving a common purpose, there were two separate seniority systems at this plant; but the Court of Appeals gratuitously assumed they were one unity and attributed the supposed motives of the IAM to the USW in determining the bona fides of a supposed plant-wide seniority "system", which is an incorrect legal standard under *Teamsters*. The Court of Appeals has fashioned from the recitation of particular circumstances in the *Teamsters* case, a four-part mechanical test of bona fides which it manipulates to reach the result it wants to reach, without regard to evidence of actual motive or purpose of the relevant bargainers.

It disregarded entirely the findings of fact of the District Court, carefully made after a lengthy trial, because it felt firmly convinced, not that any particular findings were wrong, but that the end result was unacceptable. It suggested that the District Court found the facts under an erroneous view of controlling legal principles, but did not identify any such erroneous view. In doing so the Court of Appeals acted contrary to F.R.Civ.P. Rule 52(a).

ARGUMENT

I. The Bona Fides Of A Facially Neutral Set Of Seniority Rules Ultimately Turns Upon Whether Racial Discrimination Motivated Their Negotiation And Maintenance.—

The District Court correctly applied,[5] the Court of Appeals paid mere lip service to,[6] the principle that *bona fides*

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[5] "The factors extracted by *James* v. *Stockham Valves & Fittings Co.*, [55 F.2d 310 (5th Cir., 1977)], ultimately but aids, or focal points, for deciding 'whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system' . . . " (17 FEP Cases at 739, Pet. App. 43a)

[6] "In *Teamsters* v. *United States*, [431 U.S. 324 (1977)], the Supreme Court held that, absent a showing of discriminatory purpose in a seniority system, that system is protected by §703(h)." (424 F.2d at 530, Pet App. 8a).

ultimately has to do with state of mind, i.e., motive or purpose. Although *Teamsters*, 431 U.S. 324 (1977) neither defined *bona fides* as used in §703(h), nor said which party has the burden of proving bona fides or absence thereof, it is reasonably apparent from the opinion, as well as the language of §703(h) that discriminatory purpose having a causal relation to seniority rules is ultimately determinative of their bona fides. While certain conceivable rules in union contracts operating in conjunction or tandem with seniority rules, such as a requirement of a high school diploma for jobs, must be judged by the "disparate impact" approach of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) instead of the intention or purpose approach to seniority systems adopted in *Teamsters, California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 607 (1980) holds such rules are not to be considered part of the seniority system; therefore they continue to be subject to the disparate impact analysis irrespective of bona fides. Rules specifying the onset of seniority rights, rules describing the forfeiture of seniority rights, rules defining seniority accruals, and rules particularizing the employment conditions that will be governed by seniority, are ancillary parts of a seniority system, not to be judged by disparate impact, but under the aegis of bona fides, and to be judged on the basis of intention, purpose or motivation.

The enumerated circumstances in *Teamsters*, (431 U.S. at 355-56) preceding the conclusion that—

> "In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful",

are all fairly subsumed within the crucial test of discriminatory motivation, purpose or intention.[7] (a) The circumstance

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[7] The Court also necessarily held that the additional fact that the system extends no retroactive seniority to post-Act discriminatees in assignments to jobs, likewise does not make it unlawful. For in *Teamsters* that circumstance was found to exist, but was held fully remediable by adjudging retroactive seniority to individual discriminatees without altering the seniority system.

that the seniority system in *Teamsters* applies equally to all races and "locks" members of one race in jobs no differently than similarly situated members of other races, is of course in this category; if the rules are overtly racially discriminatory, then it was certainly their purpose to discriminate. (b) The circumstance that the seniority system in *Teamsters* "is rational, in accord with industry practice, and consistent with National Labor Relations Board precedents" has significance only to the extent that it is more consistent with non-racial business motives than the opposite. *California Brewers Ass'n*, 444 U.S. 598, approved as bona fide a seniority rule which appears to be unique to that employer association and not shared by industry in general. (c) The circumstance that the seniority system "did not have its genesis in racial discrimination" is simply a restatement of motivation, purpose, or intention,[*] with particular reference to the time the seniority system came into existence.

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[*] In a footnote to *Teamsters*, 431 U.S. at 346 n. 28, this Court explained that a seniority system may have its genesis in discrimination "if an intent to discriminate entered into its very adoption." So far as this Court's use of the term is concerned, genesis thus means nothing more than intention at the time of adoption. The District Court in this case called the word genesis ambiguous, saying it presumably included an element of "the extent of racially discriminatory practices at the time the seniority system came into existence" (17 FEP Cases at 737, Pet.App. 38a) without regard to any causal relation. The ambiguity, if any, was not the result of anything in this Court's opinions, but appears to have been suggested by the Fifth Circuit's opinion in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (1977), cert. denied 434 U.S. 1034, which, in discussing "genesis" lay heavy stress on the statement that when Stockham's seniority rules were adopted, "segregation in the South was standard operating procedure"; that their history was "clouded"; that Stockham had refused to change them in bargaining, that its plant had segregated facilities until 1974. The Fifth Circuit evidently interprets genesis as meaning, to paraphrase negligence law, "discrimination in the air." See *Palsgraf* v. *Long Island R. Co.*, 248 NY 339, 162 N.E. 99, 59 ALR 1253 (1928). In its decision here reviewed, the Fifth Circuit gave controlling effect

The Fifth Circuit first created ambiguity in the term genesis and then in a series of decisions of which the present one is typical, effectively eliminated motive or purpose of seniority rules as elements of genesis, so that nothing remains of genesis except discrimination "in the air". Since there was much more of that in *Teamsters* than there is in this case, the end result is a resurrection of the "perpetuation of pre-Act discrimination" rationale with even the perpetuation element left out. By this means the Fifth Circuit has changed "genesis" from a virtual synonym for motive into a "facile abstraction used to justify a result"[9], namely a return to the pre-*Teamsters* line of cases that had routinely struck down seniority systems on the basis of perpetuation of past discrimination, regardless of the presence or absence of discriminatory motive on the part of the decision-makers.

II. Purpose And Motive Being States Of Mind, They Cannot Be Attributes Of A Set Of Seniority Rules As Such, But Must Be Ascertained As Mental States Of The Decision Makers Who Created Them.—

In *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979) it was held that:

> " 'discriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. *See United Jewish Organizations* v. *Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the *decision-maker* . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of,' its adverse effects upon an identifiable group." (Emphasis added.)

The purpose must be found in the mind of the *decision-maker*. It cannot exist in the air or independently in the

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in deciding "genesis" to what it supposed to be the motives or purposes of the IAM's actions although they manifestly could have no relevance to the reasons why Pullman and the USW decided on departmental seniority units in their contracts (624 F.2d at 532; Pet.App. 14a).

[9] *Rostker* v. *Goldberg*, _____ U.S. _____, 49 LW 4798, 4802 (June 25, 1981).

seniority rules. The validity of the seniority system or systems they constitute must be analyzed by inquiring into the decision-making procedures by which they were formed, who the decision-makers were, and what decisions they made.

Teamsters, 431 U.S. at 345, recognizes that it is "[an] employer and [a] union who jointly [create] and maintain [a] seniority system." The IAM and USW did not act jointly with each other in dealing with Pullman. Each bargained separately for separate Pullman contracts. The motives of the IAM may not have been at all the same as those of Pullman or the USW. In any event, decisions made by Pullman and the USW at the bargaining table could not be the result of the IAM's state of mind.

What the Fifth Circuit mistakenly conceived of as the seniority system at Pullman was actually the product of numerous events or decisions, principally the NLRB decision in 1941 that separate electricians' and machinists' craft units were appropriate for collective bargaining, the NLRB decisions in 1942 and 1944 to redefine that machinists unit, the joint decisions of Pullman and the USW on departmental seniority in 1942, on occupational seniority in 1947, and then in national level bargaining to go back to departmental seniority in 1954. There were also smaller decisions such as combining plant guards and janitors in one department while they were in separate *occupational* seniority units, then splitting that department in 1954, which left the already separate seniority units ever intact. Whatever the effect upon the bona fides of a joint decision relating to seniority, should it happen that the purpose of only one of the decision-makers was discriminatory, it is manifest that the state of mind of a third party having no say in the decision would not even be relevant to that of the decision-makers. No matter what motives may have been entertained by the IAM, the decisions reached by Pullman and the USW at the bargaining table must be judged solely by the evidence of *their* motives, for they were the sole makers of those decisions.

Does the Fifth Circuit's *idée fixe* of "the seniority system" as *coextensive with the plant* makes any sense, where the NLRB has certified several units in the plant for which separate unions conduct bargaining independently of the others? This is the gratuitous and wholly unreasoned basic premise of many Fifth Circuit decisions, including the present one. Thus, in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (1977), cert. denied 434 U.S. 1034, the Fifth Circuit identified as a factor in determining bona fides—

> "(2) whether the seniority units are in the same or separate bargaining units (*if the latter*, whether that structure is rational and in conformance with industry practice." [Emphasis added.]

This implies an unexplained predisposition against dividing bargaining units into smaller seniority units even if rational and customary.

In *U.S.* v. *Georgia Power Co.*, 634 F.2d (1980) the Fifth Circuit characterized its holding in the present case as follows:

> "cf. Swint v. Pullman-Standard, 624 F.2d at 532-33 (where separate bargaining units are inconsistent [sic] with industry practice and NLRB precedent, separate seniority units may be evidence of purposeful discrimination)."

Of course, in its decision herein the Fifth Circuit said nothing about the separate IAM bargaining unit as being inconsistent with industry practice, except perhaps where it said that the Bessemer "plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers." (624 F.2d at 532, Pet. App. 167). Thus, a statistical inference of inconsistency with industry practice appears to have been based on a statistical universe of three elements (Bessemer, Hammond, Butler). Nor is there any basis in the record or in fact for finding any inconsistency with NLRB cases, on the contrary the separate units were created by NLRB decisions.

In *Terrell* v. *U.S. Pipe & Foundry Co.*, _____ F.2d _____, 25 FEP Cases 1262 (1981), there were five separate bargaining units; each had a separate contract containing its own seniority rules. Yet the court's opinion repeatedly spoke of the aggregate of all these as "*the* seniority system" and held four of the unions liable for not trying to merge their seniority rules plant-wide. The opinion says (25 FEP Cases at 1268):

> "This same test has caused us . . . to hold a union liable for a seniority system which resulted from agreements negotiated by another union. In Carey v. Greyhound Bus. Co., Inc., 500 F.2d 1372 (5th Cir., 1974), for example, we held the conduct of a union to be violative of Title VII though 'disguised by a thin veneer of racial neutrality.' This apparent neutrality stemmed from the fact that the union could not negotiate directly with the bus company about the seniority of its members who would transfer to another unit represented by another union. We discerned that the union had not even made a 'concerned attempt' to rectify discriminatory practices since it had not 'actively sought' *plant seniority*. . . . In Myers v. Gilman Paper Co., [554 F.2d 837, cert dismissed 434 U.S. 801], we likewise held a non-signatory union liable for seniority provisions in another union's bargaining agreement on the ground that '[i]t is settled that Title VII required [the non-signatory union] at some point to take "the affirmative step to initiate negotiations in an effort to salvage for its own ex-members the seniority that they would inevitably and foreseeably lose [upon transfer]." ' 549 F.2d at 852 (quoting Carey, 500 F.2d at 1379).

Now this reasoning has dispensed entirely with proof of purpose or motive. In their place, seniority less than plantwide has been equated with bad faith. It holds a party strictly liable for having failed to seek by concerned action, plantwide application of seniority in the teeth of *Teamsters*' holding to the contrary. In particular, see 431 U.S. at 355 n.41:

> "In addition, there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-

> wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with an employer, in a particular plant, in a department, in a job, or in a line of progression. . . . The legislative history contains no suggestion that any one system was preferred."[18]

This was reiterated in *California Brewers Ass'n* v. *Bryant*, 444 U.S. at 608.

The Fifth Circuit calls the aggregate of seniority rules in several separate bargaining units and contracts among the production and maintenance employees at one plant "the seniority system". If it then finds a racially discriminatory motive with respect to only one contract, it holds that all the contracts fail the test of bona fides, being judged as a single system; notwithstanding entirely proper motives of the parties to the other contracts.

We believe this approach cannot survive analysis. *California Brewers Ass'n* v. *Bryant*, 444 U.S. at 605 pointed out that neither Title VII nor its legislative history defined seniority system; that it was appropriate to consider the term according to the commonly accepted notions of seniority and cited as a pertinent definition of system, a "complex unity formed of many often diverse parts subject to *a common plan* or serving *a common purpose*." (444 U.S. at 606, n. 15; emphasis added.) The contours a seniority system are thus bounded by the extent of a common plan or a common purpose — not by the

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[18] At all times material to this case, 29 U.S.C. §159(b) has provided that the *National Labor Relations Board* —

> " . . . shall decide in each case whether, in order to assure the employees the fullest freedom in exercise the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the *employee unit, craft unit, plant unit, or subdivision thereof*; . . . " [Emphasis added.]

Board findings of fact in 1941 were conclusive on courts "if supported by evidence". Wagner Act §10(e).

boundaries of a plant or its work force of production and maintenance employees.

> "Seniority systems, reflecting as they do not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all *sizes* and shapes." 444 U.S. at 608.

The appropriateness of a separate Machinists craft unit was decided by the NLRB, not by the employer or unions. It was not a seniority rule. It merely provided the basis upon which Pullman and the two unions respectively were required to bargain over seniority rules, and when they did bargain each negotiated distinctly different seniority rules. Independent decision-making processes were followed and each union had its own motives and purposes. As a matter of historical fact, these two unions were usually at cross-purposes. One favored, one opposed, a separate machinists' craft unit. One eventually swallowed up two-thirds of the other's certified unit, rejecting the rest as scabs who crossed its picket lines (17 FEP Cases at 739; Pet. App. 42a; JA 174-76, 338). They never bargained jointly and the USW wound up with departmental seniority units and the IAM with occupational seniority units. They were looking out for different sets of employees having different economic interests. There simply is no purpose or plan common to the two sets of seniority rules evolved in the two unions' contracts. Therefore, each is a seniority system and the *bona fides* of the USW seniority system must be judged on its own merits.

The complaint and both amended complaints in this case alleged that—

> "*All* matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs . . . have been, at all times material to this action, governed and controlled by *collective bargaining agreements entered into between the International Union, United Steelworkers, and the Company and/or local supplemental agreements . . . entered into between Local 1466 and*

> *the Company. Under and pursuant to the terms of the aforementioned agreements*, the defendants have established a promotional and *seniority system*, the design, intent and purpose of which is to continue and preserve . . . the defendants' policy, practice, custom and usage of limiting the employment and promotional opportunity of Negro employees of the Company because of race or color." [Emphasis added.] (JA 15-16, 20-21)

Not one word is said in the complaints about any other seniority system.

The pretrial order of June 5, 1974, which was never amended, limited the seniority issues to the following:

> "That a system of *departmental* seniority, even with changes made pursuant to a corrective action program with the Department of Labor, nevertheless perpetuates the effect of past discrimination in the assignment of black employees to generally less desirable departments. This issue subsumes the following assertions by the plaintiffs:
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> "The transfer provisions under the agreement with the Department of Labor apply to only four departments; the transfer rights which are granted under such plan are inadequate by reason of the failure to provide red-circle rates and by reason of the restriction to a single exercise of such rights; and such rights of transfer do not apply to jobs in the machine shop represented by the IAM. . . ." [Emphasis added]. (JA 29).

The only *departmental* seniority was in the USW contract. The IAM contracts ever since 1944 had provided for occupational or job classification seniority units. Therefore the only system ever challenged in the pleadings[11] was the *USW* system, although transfer rights (already provided for in the

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[11] Compare *Milliken* v. *Bradley*, 418 U.S. 717, 752, n.24 (1974), where the fact that the complaint only alleged segregation of Detroit School System was given significance in denial of inter-system busing.

Department of Labor agreement for affected employees) to the IAM bargaining unit were sought.[12]

It is quite evident that the scope of a seniority system is coextensive with the common plan or purpose which produced it or embodies it; generally speaking, it would be a function of the scope of the bargaining process by means of which it was produced. Thus, in *Teamsters*, the Teamsters Union bargained at the national level for separate but inter-related master contracts covering over-the-road drivers and city drivers respectively. The system thus encompassed all 50 of the carrier's terminals and both categories of drivers, even though there were many separate NLRB certifications. But when two unions bargain independently as these two did, in no commonly accepted or intelligible sense did they come up with a common plan, nor did they have a common purpose.

It follows that the bona fides of the departmental seniority system challenged in this case must be evaluated on the evidence of the motives and purposes of Pullman and the USW without regard to those of the IAM in negotiating its separate system.[13] There is no basis for equating seniority system with the bounds of a plant. As held in *California*

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[12] Neither IAM nor Local 372 was ever named in an EEOC charge and each was added as a party on the eve of the first trial for the sole purpose of permitting *changes* to be made in its contract which would include retroactive individual seniority remedies but not merger or abolition of the IAM bargaining unit.

[13] Acts of one school "system" cannot be vicariously attributed to another, although both are political subdivisons of the same State created by a neutral legislative body. School system lines may not be ignored or treated as a mere administrative convenience, in the interest of increased racial balance. *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

> "To the extent that the inquiry should properly focus on the state legislature . . . the actions of unrelated governmental officials would be, of course, of questionable relevance." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.20 (1980).

Brewers, 444 US at 608, seniority systems "inevitably come in all sizes and shapes". Indeed, it may well be that this USW seniority system should be considered as coextensive with the multiplant group of employees for which national bargaining has been conducted by USW since the 50's rather than simply the NLRB certified unit at Bessemer, in evaluating the motives of the USW and Pullman bargainers.[14]

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[14] Our argument does not imply that racial gerrymandering of bargaining units separately bargaining for seniority systems, may never violate Title VII. The point here is that this claim was not and could not be made an issue here; for no EEOC charge was ever made against the IAM, it was made a party to this action for the limited purpose of enabling changes to be made in its contract, and the pleadings mentioned only the seniority system in the USW contract. The validity of a seniority system is to be determined much as the validity of the city commission government was determined in *City of Mobile* v. *Bolden*, 446 U.S. 55, by evidence of its purpose; the fact that there was an adjacent predominately black city of Pritchard and the form of its governmental system would obviously have no bearing on the purpose of the Mobile system's form. Whether the municipal boundaries were gerrymandered would present an entirely different question also. Here, the questions sought to be raised about the certification of the IAM bargaining unit and the two subsequent changes therein, are likewise not germane to the motive or purpose of the USW seniority system or its bona fides. If there were anything wrong with that IAM certification there might conceivably be various remedies from appropriate tribunals, such as decertification, remedial transfers with retroactive seniority, back pay, or forced mergers, but they would not include invalidation of the USW seniority system. *Swann* v. *Board of Education*, 402 U.S. 1, 16 (1971): "As with any equity case, the nature of the violation determines the scope of the remedy." *Milliken* v. *Bradley*, 418 U.S. at 746, holding that where the disparate treatment occurred within the Detroit School System, "the remedy must be limited to that system."

III. The Fifth Circuit's Rationale For Finding, Contrary To The District Court, That The Seniority System Was Not Bona Fide, Was Contrary To The Decisions Of This Court.—

Instead of inquiring into the motives or purposes of the relevant decision-makers, i.e., Pullman and the USW, in making the decisions by which the seniority rules in their contracts evolved, the Fifth Circuit's opinion relies primarily on matters irrelevant to that inquiry: (a) the motives of the IAM, (b) alleged discrimination in departmental assignments, and (c) once segregated facilities and similar discrimination "in the air". The only matter it relied on which calls for such discussion is "The creation of new departments in the years subsequent to unionization" (624 F.2d at 531; Pet.App. 12a).

(a) The motives of the IAM have no relation to the USW motives in bargaining for a seniority system. Nor does the Fifth Circuit ever say they do. It faults the USW's motives, not for bargaining with Pullman for departmental seniority units, but for agreeing with the IAM, with NLRB approval, to modifications of its certified bargaining unit whereby USW gained large numbers of black and white employees.[11] The Fifth Circuit said (624 F.2d at 533; Pet.App.16a):

> "The U.S.W., *in the interest of increased membership*, acquiesced in the [I.A.M.'s] discrimination while succeeding in significantly segregating the departments within its own unit."

But while the particular decision-making in question (i.e., revision of the bargaining units) did not even pertain to creation of the USW seniority system, which was created jointly with Pullman, see *Teamsters*, 431 U.S. at 330, 345, it is apparent from the Fifth Circuit's statement of its own argument that the purpose of the USW's decision here was to gain

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[11] Compare *Milliken* v. *Bradley*, 418 U.S. 717, 750 (1974), which held that merger of a mixed, but predominately black school system, with a mixed, but predominately white school system, of course gives rise to no claim of segregative purpose or effect.

membership; if the IAM's motives were bad, the USW only acquiesced in, it did not share them, and it took the members in the departments in which it found them. This cannot be a discriminatory purpose on the part of the USW as defined in *Feeney*, 442 U.S. at 279, for that would require that the USW "selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of,' its adverse effects upon an identifiable group." There were no adverse effects on blacks in these decisions anyway, but certainly the USW's only apparent motive was to gain members, not to hurt blacks.[14] Certainly the USW must be deemed to have thought membership in it was advantageous and not detrimental, for it requires payment of dues. As for Pullman's motives for approving or acquiescing in the December, 1941, and 1944 bargaining unit changes, they are shown without dispute and by unimpeachable documentary records to be as follows: The NLRB was urging Pullman to sign the December 19, 1941 modification, by letters and phone calls; Pullman felt it didn't make much difference which union represented the classifications affected; Pullman saw no adverse effects if it signed

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[14] It may be necessary to resolve the question of burden of proof of *bona fides* in dealing with such subsidiary matters of fact. The Fifth Circuit did not refer to burden of proof at all, simply overturning substantially all of the District Court's findings. The District Court placed the burden of proof of bona fides on the defendants, though conceding the opposite view was supported by considerable logic (17 FEP Cases at 732; Pet.App. 25a). Most lower courts place the burden on the plaintiff. *Harris* v. *Anaconda Aluminum Co.*, 479 F.Supp. 11 (N.D. Ga. 1979); *Dickerson* v. *U.S. Steel Corp.*, 439 F.Supp. 55 (E.D. Pa. 1977), vacated and remanded on other grounds sub nom. *Worthy* v. *Dickinson*, 616 F.2d 698 (3d Cir. 1980); *Edmonds* v. *Southern Pacific Transportation Co.*, 19 FEP Cases 1052 (N.D. Cal. 1979); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), cert. denied 440 U.S. 981 (1979); *Younger* v. *Glamorgan Pipe & Foundry Co.*, 20 FEP Cases 766 (W.D. Va. 1979), aff'd, 621 F.2d 96 (4th Cir. 1980) (per curiam); *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1144, 1145-46 (N.D. Fla. 1979); and we submit that this is the correct view.

subject to NLRB orders, so it signed "Since the Atlanta [NLRB] office seems to attach some importance to it" (JA 293). It signed the document "ACCEPTED: as noted below. . . . NOTE: Assuming the foregoing is satisfactory to the Board, and subject to Board orders." As for the 1944 modification, Pullman's purpose in signing was in the interest "of harmonious operation of the Bessemer plant" (JA 176), there having been numerous organizational or jurisdictional strikes up to then; it declared it had taken no position in the selection by its employees of bargaining representatives, and acquiesced in the modification "subject to any valid order or directive by public authority or requirement of law to the contrary." (JA 176). There is no evidence of any racial motive on Pullman's part. It had been hiring blacks in the IAM bargaining unit (JA 255). According to the evidence, Pullman's motives were entirely proper. Industrial peace is also a goal of Federal labor policy.

(b) As for alleged discrimination in departmental assignments, within the period of limitations, both courts below treated this as relevant (the District Court said essential) to determining the bona fides of the seniority system (15 FEP Cases at 147; 624 F.2d at 529, 531; Pet.App. 52a, 6a-8a, 10a). However, in *Teamsters*, it was established that there had been systematic and purposeful employment discrimination in hiring line and city drivers continuing well beyond the effective date of Title VII, and there were over 40 specific instances shown of such discrimination.[17] Even so, it was held that the

[17] There was not one specific instance here. The District Court found that during the post-1966 period there was a policy of active efforts to get blacks into formerly all-white jobs and no statistical basis for inferring discrimination against blacks (15 FEP Cases at 148, Pet.App.53a); "that by December 1966 the company was no longer making assignments to departments based on race — except, that is, to the extent of attempting to rectify imbalances" (15 FEP Cases at 149; Pet.App. 56a); that even as to pre-Act assignements, "The court is not however saying that racial considerations were the sole determinant of assignments. The court rather is impressed . . . that bona fide job qualifications played the decisive role in

seniority system was bona fide and such discrimination could be adequately remedied by individual awards of retroactive seniority. It did not relate to the validity of the system itself.[18] So in the present case, where from 1966 on, Pullman was busily engaging in reverse discrimination wherever it could (11 FEP Cases at 951; 15 FEP Cases 149; Pet.App.120a, 56a) and the only actual assignment data mentioned by the Fifth Circuit related to the IAM bargaining unit (624 F.2d at 529; Pet.App. 7a, 162-63) (1) which is outside the bounds of the seniority system in question; (2) which alleged discrimination could be adequately compensated by transfer and retroactive seniority to affected individuals, if any; (3) and which data if evaluated statistically in relation to availability of black machinists and millwrights in the labor market show no inference of discrimination anyhow. (Co. Ex. 307).

(c) Likewise, matters such as formerly segregated bathrooms and other discrimination "in the air" we have previously shown also to be irrelevant to bona fides of a seniority system. This sort of evidence was present in *Teamsters*, yet it did not defeat the bona fides of the seniority system.[19]

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assignments to many of the key jobs and departments. . . ." (15 FEP Cases at 148, n.13; Pet.App.55a, n. 13). The Fifth Circuit's rejection of these findings was based on consideration of a small number of assignments of machinists and millwrights in the IAM units and disregard of evidence of work force demographics (Co. Ex. 307, 351) and statistical methodology (624 F.2d at 529, Pet.App.7a), making its reasoning entirely unacceptable as a basis of disregarding Rule 52(a).

[18] *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1103, 1133-34 (N.D. Fla. 1979): "In line with the case law dating both before and after the Teamsters decision, this court must conclude that evidence of discrimination in the arrangement and staffing of lines of progression is not probative of bias in the seniority system"

[19] Likewise, in *City of Mobile* v. *Bolden* , 446 U.S. 55, 74 (1980) such discrimination in the air was held not to prove purposeful discrimination in adoption of a commission system of city government: " . . . the District Court and the Court of Appeals sup-

What the Fifth Circuit has done is to take the enumeration of cuicircumstances in *Teamsters* and fashioned them into a four part obstacle course in which the essential holding of *Teamsters*, the good faith state of mind of the decision-makers when they agreed on the system, has been lost sight of.[20] This fourfold test is applied mechanically in a framework wherein the seniority "system" is gratuitously taken for granted to be of plantwide scope and where the purpose of one actor is attributed to another on the ground that the latter acquiesced in the former's actions. What we have is result-oriented reasoning which if applied to the facts of *Teamsters* or to any unionized plant in the South would condemn all their seniority systems. In this manner the result in *Teamsters* is now regularly avoided in the Fifth Circuit.

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ported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn . . . action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question."

[20] The Fifth Circuit's process of reasoning in this manner was entirely similar to that which this Court's opinion described and rejected in *City of Mobile* v. *Bolden*, 446 U.S. at 72-73, as follows: ". . . the Court of Appeals acknowledged that the Equal Protection Clause . . . reaches only purposeful discrimination, but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in Zimmer v. McKeithan, [485 F.2d 1287]. Thus, because the appellees had proved an 'aggregate' of the Zimmer factors, the Court of Appeals concluded that a discriminatory purpose had been proved. . . . Although presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called Zimmer criteria . . . were most assuredly insufficient to prove [a] discriminatory purpose. . . ."

IV. The Fifth Circuit Disregarded F.R.Civ.P. Rule 52(a) By Setting Aside Findings Of The District Court Which Were Not Clearly Erroneous.—

The District Court cast its findings concerning seniority according to the four-part prescription which the Fifth Circuit formulated from *Teamsters* in *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d at 351. It found three of these factors (neutrality, rationality, purposes) favorably to defendants (17 FEP Cases at 733-39; Pet.App. 28a-44a) and that the fourth (genesis) favored plaintiffs only "if causation be ignored and the existence of other discrimination be deemed sufficient". In other words, if what we have called "discrimination in the air" is sufficient to prove "genesis", then "The 'genesis' factor may be said to be favorable to the plaintiffs. . . ." (17 FEP Cases at 739, n.22; Pet. App. 44a, n.22). We have argued above that genesis means purpose with particular reference to original creation of the seniority system and that it cannot properly be considered as a factor separate from "purpose" or, consistently with *Teamsters*, equated to discrimination in the air. In the final analysis the District Court thus found all the facts in defendants' favor on the question of bona fide seniority system, and in any event found the totality of the evidence showed no purposeful discrimination in connection with the establishment or continuation of the seniority system (17 FEP Cases at 739; Pet.App. 44a).

(1) *Neutrality of System.* — The District Court found the system facially neutral in the same sense it was in *Teamsters* (except to the extent the 1972 agreement with the Department of Labor required reverse discrimination). It was applied equally to all races (17 FEP Cases at 733; Pet. App. 28a-29a). The Fifth Circuit refused to apply F.R.Civ.P. 52(a) to any District Court findings, whether or not supported by evidence, but made its findings de novo, giving this explanation (624 F.2d at 525, n.6; Pet. App. 15a, n.6):

> "Findings of fact by the district court in Title VII are not to be set aside unless they are clearly erroneous . . . , that is, unless the appellate court is 'left with the definite

and firm conviction that a mistake has been committed.' . . . When findings, however, are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand."

The rationale seems to be that if the Fifth Circuit disagrees strongly enough with the end result, it rewrites the facts. It made no examination of the District Court's findings in detail and did not ascertain whether severally they were supported by evidence. As for the alternate ground for disregarding Rule 52(a) that the District Court entertained "an erroneous view of controlling legal principles", the Fifth Circuit did not identify a single erroneous legal view of the District Court or explain how any such view entered into any particular finding. The Fifth Circuit implicitly found (624 F.2d at 530-31; Pet.App.10a) the seniority system was not neutral because "by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites." This is a resurrection by paraphrase of the "perpetuation of past discrimination" criterion which *Teamsters* expressly held was not a basis for invalidating a seniority system. The District Court's opinion correctly analyzed *Teamsters* (17 FEP Cases at 733-34; Pet.App. 28a-30a) as signifying by neutrality the same characteristics in the Teamsters' contracts as exists in the U.S.W.-Pullman seniority system,[21] and correctly rejected the idea that evidence of relative economic desirability is relevant if it favors plaintiffs but irrelevant if it favors defendants (17 FEP Cases at 734; Pet.App.30a).[22]

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[21] It was also held in *City of Mobile* v. *Bolden*, *446* U.S. 55 at 67-68, that proof of disproportionate effect is not sufficient to show discriminatory purpose or intent in adopting a system of city government. A seniority system is "neutral" in the same sense that the Mobile city commission government was neutral, although only white commissioners had ever been elected. Where the system "is readily explainable on grounds apart from race, . . . disproportionate effect alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." 446 U.S. at 70.

[22] The Fifth Circuit disregarded elementary principles of evidence and common sense in so holding. F.R.E.Rule 401: " 'Relevant

As for "rationality", the District Court pointed out (17 FEP Cases at 734; Pet.App.30a-31a) that "It may well be that — [in *Teamsters,*] in discussing the restriction against transfers to line driver jobs as involving separate bargaining units, which was itself viewed as rational, in accord with industry practice, and consistent with NLRB precedents — the Supreme Court was not proposing a standard for Section 705 (h), but was rather highlighting facts which demonstrated the bona fides of the seniority rule in question." However, the District Court concluded it was bound by the Fifth Circuit's decision in *James* v. *Stockham Valves,* 559 F.2d 310 (1977), cert. denied 434 U.S. 1034, to deal with rationality and consistency with industry practice as if a separate element of bona fides. Although a number of courts have endorsed the *James* four-part formula, the Court recognized in *California Brewers Ass'n* v. *Bryant,* 444 U.S. 598 that "Significant freedom must be afforded employers and unions to create differing seniority systems", they "inevitably come in all sizes and shapes", and reflect "the give and take of free collective bargaining." Indeed, that "*It does not behoove a court to second-guess that process or its products.*" *California Brewers* thus approved as bona fide a seniority rule which was unusual and not like most seniority systems. The District Court's conjecture that *Teamsters* did not attach controlling importance to "rationality and consistency with industry practice", but cited that particular as a sort of circumstantial corroboration of bona fides, thus seems more in keeping with this Court's decisions, than the talismanic effect given to the *James* factors by the Fifth Circuit.

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evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable. . . .*" [Emphasis added.] Michael and Allen, *The Trial of an Issue of Fact,* 65 (1934): "We must take account of the total amount of relevant knowledge regardless of whether it is favorable or unfavorable." *United States* v. *Morgan,* 581 F.2d 933 (D.C. Cir. 1978). If it be of consequence to the determination of the action to measure the economic effects of a seniority system, the good effects have to be weighed with the bad, yet the Fifth Circuit says the former are irrelevant.

In any case, the District Court found that (17 FEP Cases at 735; Pet.App.32a):

> "In context, and taken as a whole, the seniority units at Pullman's Bessemer plant constitute a rational structure. They are, moreover, consistent with practices which were at the time generally followed at other unionized plants throughout the country, at other companies in the same industry, and indeed at Pullman plants located outside the South when race was presumably not a potential consideration."

These findings were well supported by undisputed evidence that the departmental structure in the USW bargaining unit was quite similar to that in other car building plants and that the modal or most prevalent kind of seniority system in car plants and in U.S. industry generally was of the departmental kind (17 FEP Cases at 735, Pet.App. 33a). The District Court further found (17 FEP Cases at 734, Pet.App. 31a) that, given the economic conditions under which the Bessemer plant must operate, "the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumping or displacement, highly inefficient performance, or excessive grievances over ability factors, or all of them." Although these findings were founded on substantial evidence, and the Fifth Circuit did not question that, it reversed all of these findings. It substituted its own finding (624 F.2d at 531, Pet. App. at 11a) that "The establishment and maintenance of segregated departments appear to be based on *no other considerations* than the objective to separate the races" [Emphasis added], totally disregarding the evidence of substantial economic reasons for departmental administration of seniority credited by the trial court,[23] and

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[23] Compare *City of Mobile* v. *Bolden*, 446 U.S. at 71, n.17: "If the . . . Court meant by its statement that the existence of the at-large electoral system was . . . unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile." In this case, the history of the USW-Pullman seniority system explained its non-racial purpose.

asserting (624 F.2d at 533, Pet.App.16a) that "No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers." This totally disregards the findings and the evidence, particularly the fact that at all material times the large majority of black employees have been in racially well-mixed departments; and infers contrariness to industry practice from a statistical universe of three Pullman-Standard plants (Bessemer; Hammond, Indiana; and Butler, Pennsylvania), and in total disregard of the legislative mandate to the NLRB in §9(b) of the Labor-Management Relations Act, 29 USC §159(b), that—

> "The *Board* shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collector bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." [Emphasis added.]

Clearly the existence of separate craft bargaining units and units of all other employees has been commonplace ever since passage of the Wagner Act. Such existence supported by NLRB certification cannot possibly be considered as evidence of contrariety to industry practice. Sometimes a union petitions for a craft unit, sometimes not. Sometimes employees vote against a craft unit. So the Board quasi-legislatively imposes this bargaining unit structure sometimes, and sometimes does not, and certainly the industry practice of abiding by lawful NLRB rulings explains completely why this difference between Bessemer, Hammond, and Butler exists. Other Pullman plants had bargaining units consisting of fewer than all production and maintenance employees anyway. See footnote *4*, supra.

Furthermore, as previously shown, the only seniority *system* in controversy is the set of rules bargained for between Pullman and USW. The IAM unit has its own *occupational*

seniority system based on what that union demanded as best suited for its craft members, with no plan or purpose common to the two systems. The fact that under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 758, the courts can order transfer of individuals discriminated against into that bargaining unit with retroactive seniority furnishes an adequate remedy to such individuals, if any (none were shown), does not have any bearing on the question whether there are two separate seniority systems whose bona fides is tested separately under §703(h).

The Fifth Circuit constantly confuses the concepts of separate bargaining units and separate seniority units. The existence of separate bargaining units certainly is explained completely by the fact that the NLRB certified them. The motives of the NLRB, the decision-maker in that, have not been impugned at all, but even if the motives of the IAM[24] were bad,

[24] The NLRB hearing transcript in 1941 (JA 108) showed that the IAM sought to represent a craft unit composed of

> "all machinists, apprentices and helpers in the maintenance and other departments where they work, namely the wheel and axle shop, the machine shop, the tool and die shop, and the air brake department."

After considerable wrangling over craft lines at the NLRB hearing, the IAM representative stated that he sought a unit of everyone he could represent under the union's constitution (JA 146-47), specifically including black employees (JA 144-45, 149). The NLRB Decision and Direction of Election (JA 155-56, 163-64) specifically found the unit sought by the IAM was an appropriate craft unit. Following the election and Board certification the unions under Board auspices agreed in writing to corrections of the unit descriptions to move some non-craft employees, mostly black, from the IAM to the USW Unit. After a month of NLRB urging Pullman indicated its acceptance of this (JA 170-71) and it was made an addendum to the initial IAM and USW contracts. The IAM unit was not all-white after this transaction, however for there were four black employees in it in 1944 (JA 255; P.Ex.63, p.3; P.Ex. 1, p.19; P. Ex. 2, Welding Department, p.2). Following some organizational or representational strikes in 1944 the USW petitioned for certifica-

the evidence shows the USW opposed separate bargaining units (17 FEP Cases at 733, Pet.App. 42a; JA 107, 155, 288, 291-92), and Pullman took no position for or against them at any time (17 FEP Cases at 739, Pet.App.42a-43a; JA 110, 155, 293). Once it is recognized that Pullman and USW had no real choice but to bargain in accordance with the Board certifications (JA 140, 146), it is perfectly obvious why the USW and IAM fractions of the Die & Tool Department, and of the Maintenance Departments, wound up in separate seniority groupings as well as separate bargaining units. For the law is plain that these respective unions became the statutory[11] *exclusive* representative of all the employees in such units in respect to rates of pay, wages, hours of employment, or other conditions of employment. The USW could no more bargain about who could hold seniority (i.e., be an employee) as a millwright or machinist, or how it is measured, accrued, applied, etc., than it could bargain for rates of pay for those classifications. Similarly, the IAM could not bargain about seniority rights of any job-holders exclusively represented by the USW. Even before the Taft-Hartley amendments in 1947 made insistence on such bargaining a union unfair labor practice, *Douds* v. *Int'l Longshoremen's Ass'n*, 241 F.2d 278 (2d Cir. 1947); *Local 323, IBEW (Hoff Electric Co.)*, 242 NLRB 305 (1979), either union was simply without legal authority to bargain over seniority in jobs in the other's bargaining unit. The circumstances were different in *Teamsters*, where the same parent union bargained for master contracts covering about a hundred bargaining units. Here,

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tion as representative of *all* employees in the IAM unit, but withdrew its petition when the IAM agreed to surrender to the USW some 100 out of the 150 employees in its unit, retaining only machine shop personnel and millwrights, who had crossed the USW picket lines, and whom the USW declined to represent, as "scabs." (JA 337-38). While the Fifth Circuit assails the IAM's principal motives as "obvious[ly] . . . in 1941 to exclude black workers from its bargaining unit", the direct evidence introduced is entirely to the contrary.

[11] 29 USC §159(a)

these unions were not acting in concert with one another in bargaining with Pullman, and it was a practical if not inevitable result of the law that the fractions of the Die & Tool and Maintenance Departments in the separate bargaining units became, as the result of separate bargaining, separate seniority units too (JA 140 at n.19).

(3) *Genesis.* — The term properly means purpose, motive or causation with particular reference to origin or beginning; as such, discrimination in the air, which was present in abundance in *Teamsters,* is not a basis for inferring discriminatory genesis. The District Court properly found that (17 FEP Cases at 739, n. 22, Pet.App.44a, n.22)

> "The 'genesis' factor may be said to be favorable to the plaintiffs if causation be ignored and the existence of other discrimination be deemed sufficient."

The Fifth Circuit's opinion (624 F.2d at 532, Pet. App.-12a-14a) is somewhat fuzzy about the meaning of "genesis"; but in the end equated it with discrimination in the air. The Fifth Circuit finds there was formerly extensive segregation at the Bessemer Plant; that the "motives and intent of the IAM in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination" without regard to any causative relation to the decision-making process as between the USW and Pullman; and "The record makes clear that blacks were restricted from the better jobs under the first USW contract" (624 F.2d at 532, Pet.App.14a). Based on these findings, the Fifth Circuit concluded "that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." While it is true there was formerly extensive segregation at the Bessemer plant, this factor existed in comparable degree in the *Teamsters* case, and appears to have had no causal relation to the seniority system in either case. It is a gross fabrication that blacks were restricted from better jobs under the first USW contract. That contract did not mention race or any restriction from better jobs. If there was any such restricton it was extraneous to the

contract. The metaphor that considerations of race "permeated the negotiation and the adoption of the seniority system *in 1941*" asserts that there was discrimination in the air, not causal effect on decision-making; and the Freudian slip on the date[26] shows the Fifth Circuit confuses NLRB certification of separate units (November 19, 1941, JA 161-66, amended December 19, 1941, JA 170-71) with adoption of seniority systems. There was no seniority system in 1941. Under *California Brewers*, 444 U.S. 598, 608,

> ". . . against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment . . . [s]ignificant freedom must be afforded *employers and unions* to create different seniority systems." [Emphasis added.]

Seniority systems are creatures of contract, created by collective bargaining between unions and employers. The NLRB decisions determined the bounds of the bargaining units in 1941, but the seniority systems and seniority units arose only in 1942 as the result of the separate collective bargaining negotiations. The Fifth Circuit keeps referring to bargaining units erroneously as seniority units (624 F.2d at 533, Pet.App. 16a). Genesis of the USW seniority system must refer to the latter decision-making process.

(4) *Motive or Purpose.* — The District Court found "that the seniority system between the Company and the USW has been negotiated and maintained free from any discriminatory purpose" and did so after it "carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years." (17 FEP Cases at 739, Pet.App. 43a). The Fifth Circuit flatly rejected these findings and substituted its own that "There is no doubt . . . about

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[26] The first USW and IAM contracts were both agreed to on April 7, *1942* (JA 167, 180).

the existence of a discriminatory purpose" (624 F.2d at 533, Pet.App. 15a). Then it says that was the *IAM's* purpose but USW acquiesced in it (624 F.2d at 533, Pet.App. 16a) and "No credible explanation has been advanced to sufficiently justify the separate seniority units meaning, of course, bargaining units (624 F.2d at 533, Pet.App.16a).

We have previously shown some errors in this rationale. At this point we wish to emphasize that the *decision-maker* must have acted because of and not merely in spite of adverse consequences on some ascertainable class before discriminatory purpose can be found. It was not the NLRB decisions which created the USW-Pullman seniority system; it was not the decisions of IAM; but it was the joint decisions of Pullman and the USW which must be examined to determine the bona fides of the seniority rules they negotiated and adopted. The facts support no inference of discriminatory purpose of those decisions or of the system in existence in the USW bargaining unit when the statute of limitations applicable to this case began to run.

The first such decision was made in 1942 to adopt a departmental seniority clause. This was proposed by the USW biracial bargaining committee and accepted by Pullman (17 FEP Cases at 738, Pet.App. 40a; JA 181, 261, 265, 267-69). There was no evidence that either of them contemplated any adverse effect on either race. As there were no enforceable seniority rights until then, it would seem to contemplate conferring benefits on both races not previously enjoyed. Until then, Pullman could have laid off all blacks before any whites, or vice versa, or could have retained employees of both races strictly on the basis of ability to do the work. There is no evidentiary basis of racially discriminatory purpose in this decision.

The second significant decision was made in 1974, when, as proposed by black USW negotiating committeeman Gus Dickerson (17 FEP Cases at 738, Pet.App. 41a; JA 256, 274) occupational seniority units were agreed on in the USW con-

tract (JA 189). There was no direct evidence of the motive for this change. To the extent that it represented some increased restraint on upward (as well as downward and lateral) job mobility of all employees, any circumstantial evidentiary effect that might have on the question of motive is cancelled by the third decision. Pullman could well have been motivated by efficiency considerations, keeping people of both races to the maximum extent in familiar jobs. Black employees may have thought their job security against displacement would be enhanced by occupational seniority.

The third decision in 1954 was to go back to departmental seniority. This returned the seniority rules at Bessemer to the same departmental basis as those at Hammond, Indiana, where the black percentage was small (JA 242), and Butler, Pennsylvania, where it was less than 1% (JA 206). If, as the Fifth Circuit uncritically takes for granted, the smaller the seniority unit size, the more disadvantage to blacks, how could this third decision be evidence of anti-black motivation? On the contrary, given that assumption, it would indicate motivation of favoring blacks. Indeed, since whatever separation of the races there was in the USW bargaining unit at Bessemer was by job classification and not by department (the great majority of blacks were in racially mixed departments from 1941 forward), (JA 243-51; 539 F.2d at 86; Pet.App. 77a) the 1954 decision could only indicate a purpose of moving away from contractual restrictions on mobility. The fact that Butler had similar departments and departmental seniority but practically no black employees indicates no improper purpose in going to the same arrangement at Bessemer. The fact that the IAM bargaining unit had an occupational seniority system since 1944 likewise indicates no improper purpose of departmental seniority units in the USW contracts.

The fourth decision, in the 1969 and 1972 affirmative action agreements with the Department of Labor, was to adopt deliberately racial preference for blacks (See Summary at 17 FEP Cases at 732-33, Pet.App. 27a).

Departmental changes. — Other decisions about seniority which were shown not to be racially motivated included rejection by unanimous and largely black vote of a Pullman proposal to merge several departments (17 FEP Cases at 735, Pet.App.34a; JA 54-61). The Fifth Circuit refers particularly (624 F.2d at 531-32, Pet.App.12a) to the white plant guards and black janitors being combined in the same department (but different job classifications and therefore different seniority units) on the seniority roster of February 1, 1951, but being moved back into separate departments on September 1, 1954. The point is they were always in separate seniority units, because September 1, 1954 was when the seniority units were changed back to departmental from occupational. The work of guards and janitors obviously has very little in common and nobody's seniority was affected or otherwise disadvantaged either by the merger or the separation. Even more significantly, when white Union President Ethridge proposed merging the janitors and plant guards again in 1962 (P. Ex. 104), black union committeeman (later Union President, JA 80, 82, 84) Perry Thompson, a janitor, vigorously protested that he would quit his job first, and the proposal was dropped (JA 238). This evidence shows no invidious motive, then. The basic departmental structure remained largely the same for 40 years. A number of organizational changes were practically necessitated by the NLRB bargaining unit certifications and changes therein; some were made when organizational seniority was adopted in 1947 and unmade upon the return to departmental seniority in 1954, so that there was no effect on seniority groupings either time. The only real changes in *seniority* groupings after 1942 were these: Two large, racially well mixed departments (Paint and Shipping Track) were combined September 1, 1954. The Inspection Department was formed from inspectors, then all white, March 1, 1949, which was during the era of occupational seniority, dissolved three months later, and formed again June 1, 1950. This was the only significant newly created department since certification, but even so, involved a

small number of employees.[27] While the Fifth Circuit refers to indications of "attempts to maintain one-race departments" the empirical fact is that the attempts, if any, must have been astonishingly ineffective inasmuch as over 90% of the employees were always in mixed departments. This fact and the return to departmental seniority in 1954 both show without serious question that to the extent there was racial discrimination at Bessemer, it existed in spite of and not because of the departmental system, and the Fifth Circuit simply arrogated the fact-finding function in disregard of Rule 52(a) under color of asserting the District Court made its findings under some unspecified erroneous view of the law (624 F.2d at 533, n.6, Pet. App. 15a, n.6). There was nothing wrong with the District Court's legal principles and certainly nothing that would justify total disregard of Rule 52(a), which is just as applicable to this type case as any other.

The truth is that the Fifth Circuit's decision is result-oriented, not fact-oriented; ideological, not logical. The cause of racial equality is not well served by disregard for evidence and due legal procedures, and the decision of the Fifth Circuit should be reversed.

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[27] The departmental seniority status of inspectors resulted from two decisions: to collect them in one department in 1951, which could not be racially motivated because their seniority then was occupational; and the decision to go back to departmental seniority in all USW departments in 1954, which if racially influenced, could only favor black mobility. The end result is criticized by plaintiffs, but was the accidental product of two decisions not motivated by anti-black sentiment. The separateness of Inspection Department is both commonplace and common sense. (17 FEP Cases at 735, 736-37, Pet. App. 32a, 37a).

CONCLUSION

The decision and judgment of the Court of Appeals for the Fifth Circuit should be reversed, and judgment rendered for defendants adjudging that the seniority system adopted by Pullman and USW is bona fide and denying all relief based on said seniority system.

Respectfully submitted,

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